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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE
No. 12-IIB10
July 27, 2012

REQUESTED BY:

Mr. Andrew Staub
Reporter
The News Journal
P.O. Box 15505
Wilmington, DE 19850

OPINION BY:

Kent Walker, Deputy Attorney General
Delaware Department of Justice

and

Ian R. McConnell, State Solicitor
Delaware Department of Justice

Re: FOIA Petition against the City of Wilmington – The News Journal Request for
City of Wilmington Police Compensation Records

Dear Mr. Staub:

This Office received your email regarding the exclusion of the names of some city police officers from the city employee salary data provided to you by the City of Wilmington. We are treating your complaint as a petition to the Attorney General for a determination as to whether the denial of that information violated the Delaware Freedom of Information Act (“FOIA”) 29 Del. C. ch. 100.

Pursuant to 29 Del. C. § 10005(e), we forwarded your email to the City of Wilmington and its legal counsel for their response. The City Solicitor replied that providing the names of

law enforcement officers and their compensation would violate 11 Del. C. § 9202 ("Section 9202") and that, accordingly, those records are exempt from disclosure under 29 Del. C. § 10002(g)(6), because they are specifically exempted from public disclosure by statute.

LEGAL AUTHORITIES

The legal authorities relevant to FOIA and your petition are the following:

Public Records Defined and Duty to Disclose

"Public record" is information of any kind, owned, made, used, retained, received, produced, composed, drafted or otherwise compiled or collected, by any public body, relating in any way to public business, or in any way of public interest, or in any way related to public purposes, regardless of the physical form or characteristic by which such information is stored, recorded or reproduced. 29 Del. C. § 10002(g).

FOIA requires that "[a]ll public records shall be open for inspection and copying by any citizen of the State during regular business hours by the custodian of the records for the appropriate public body." 29 Del. C. § 10003(a).

Exemptions from Definition of Public Records

FOIA exempts from the definition of Public Record and its duty to disclose "[a]ny personnel, medical or pupil file, the disclosure of which would constitute an invasion of personal privacy, under this legislation or under any State or federal law as it relates to personal privacy." 29 Del. C. § 10002(g)(1). FOIA also exempts "[a]ny records specifically exempted from public disclosure by statute or common law." 29 Del. C. § 10002(g)(6).

The Burden of Justifying Withholding Records is on the Custodian.

"In any action brought under this act, the burden of proof is on the custodian of records to justify the denial of access to records. 29 Del. C. § 10005(c). This allocation of the burden of proof underscores the basic public policy that disclosure, not secrecy, is the purpose behind the act, . . .". *Guy v. Judicial Nominating Comm'n*, 659 A.2d 777, 781 (Del. Super. 1995).

Exemptions Must be Narrowly Construed in Favor of Disclosure.

FOIA provides in its declaration of legislative intent that: "... it is vital that [the public] have easy access to public records in order that society remain free and democratic. Towards these ends, and to further the accountability of government to the [public], this chapter is adopted, and shall be construed." 29 Del. C. § 10001. In order to comply with that statement of legislative purpose, the rights FOIA creates are broadly construed, while the exceptions to those rights are construed narrowly. *See Am. Civil Liberties Union of Del. v. Danberg*, 2007 LEXIS 61, at *4, 2007 WL 901592, (Del. Super. March 15, 2007); *see also, Att'y Gen. Op. No. 10-IB01*, 2010 Del. AG LEXIS 1, January 22, 2010.

When considering two possible interpretations of FOIA, we must favor disclosure. *See Layfield v. Hastings*, 1995 LEXIS 82, 1995 WL 419966 (Del. Ch. July 10, 1995); *Att'y Gen. Op. No. 10-IB06*, 2010 Del. AG LEXIS 6, July 15, 2010.

"Personnel Files" Exemption does not Exempt Salary and Non-Salary Compensation Records

In a long line of opinions, this Office has determined that FOIA's personnel file exemption does not exempt the names, job classifications, and salaries of public employees because disclosure would not "constitute an invasion of personal privacy." 29 Del. C. § 10002(g)(1); *Att'y Gen. Op. 3W-077* (Aug. 4, 1977); *Att'y Gen. Op. 3W-023* (Mar. 10, 1978); *Att'y Gen. Op. 02-IB24* (Oct. 1, 2002); *Att'y Gen. Op. No. 06-IB11*, 2006 Del. AG LEXIS 9, May 31, 2006.

In *Gannett Co. v. Colonial School District*¹, the Superior Court agreed, holding that the salaries of public employees were public information under FOIA. The Court stated that "[a]lthough some might feel that the amount of their salary is personal, it is generally recognized

¹ Civ. A. No. 82M-DE-26, 1983 LEXIS 791 at *1, 1983 WL 473048 (Del. Super., Aug. 19, 1983) (Balick, J.).

that the public has a legitimate interest in knowing the salaries of persons who are paid with public funds and public employees have no right of privacy in this information.”

In *Att’y Gen. Op.* 06-ID11 (May 31, 2006), our Office extended that reasoning to include time sheets and attendance records of public employees. The Opinion states, in relevant part, that “[j]ust as the public has a right to know the salary paid to public employees, the public also has a right to know when their public employees are and are not performing their duties for which they are paid.”

We also believe that Delaware courts would hold that disclosure of non-salary, total compensation to public employees would not constitute an invasion of privacy, and therefore is not protected by FOIA's personnel file exemption. The public has a right to know how their public servants are compensated with taxpayer monies in whatever the form that compensation might take. *Att’y Gen. Op.* No. 06-IB14, 2006 Del. AG LEXIS 13, July 12, 2006.

ANALYSIS

The salary and non-salary compensation of Wilmington police officers are records in the custody of the City of Wilmington. As with the compensation records of all other public employees in this State, the compensation records of Wilmington police officers are public records subject to disclosure under FOIA. Those records are not subject to the privacy exemption of 29 Del. C. § 10002(g)(1), and the City, as custodian of those records, has not met its burden of proof justifying its denial of access to those records.

THE CITY’S STATUTORY EXEMPTION CLAIM

The City claims that disclosure of these police compensations records are specifically prohibited by statute and, hence exempt from FOIA, 29 Del. C. § 10002(g)(6). The City cites a portion of the Law-Enforcement Officers’ Bill of Rights, 11 *Del. C.* § 9202, which states:

No officer shall be required or requested to disclose any items of personal property, income assets, sources of income that's personal or domestic expenditures (including those of any member of the officer's household) unless such information is necessary in investigating a violation of any federal, state, or local ordinance with respect to the performance of the officer's official duty or unless such disclosure is required by state or federal law.

The City's claimed exemption fails for numerous reasons. First, the request was made of the custodian of records, the City of Wilmington, not of any police officer. No one has requested that any police officer disclose any information at all. Hence, Section 9202 cannot apply.

Second, the rights and privileges afforded to police officers by Section 9202 are part of a comprehensive scheme expressed by the intent of the General Assembly for the protection of those officers in disciplinary proceedings. Those rights are personal to each law enforcement officer covered by the act. *See 11 Del. C. § 9209*. There is nothing in the Law-Enforcement Officers' Bill of Rights that requires or permits a public body, as custodian of records, to assert those personal rights, either on its own behalf or behalf of an officer. Therefore, the City's invocation of the personal rights of police officers is not warranted by Section 9202.

Third, the Law-Enforcement Officers' Bill of Rights gives no hint of any exemption from FOIA-required disclosure. On the contrary, Section 9209 expresses the General Assembly's intent as to the application of Section 9202:

The [sic] chapter shall apply to all law-enforcement disciplinary proceedings throughout the State, conducted by the law-enforcement agencies specified in § 9200(b) of this title.

Fourth and finally, if, assuming for argument's sake Section 9202 does apply to this request, disclosure nevertheless is required by state law under FOIA.

CONCLUSION

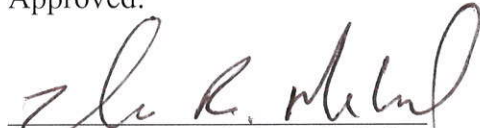
The Attorney General, for the reasons set forth above, determines that, because the compensation records of Wilmington police officers are public records in the custody of the City and because no exemptions from disclosure apply, the City's refusal to disclose those records to the requestor violates FOIA.

Very truly yours,



Kent Walker
Deputy Attorney General

Approved:


Ian R. McConnell, State Solicitor

cc: John R. Sheridan, City Solicitor